NO. 78-38

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.,

Petitioners,

vs.

LEROY FOUST,

Respondent.

BRIEF FOR RESPONDENT

TERRY W. MACKEY
Attorney for Respondent

Urbigkit, Mackey & Whitehead, P.C.
The Mall, Suite One
1651 Carey Avenue
P. O. Box 247
Cheyenne, Wyoming 82001

INDEX

TABLE OF AUTHORITIES

CASES **Page**

Statutes:

Other Sources:

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.,

Petitioners,

vs.

LEROY FOUST,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent would make the following addition to the statement of the case in Petitioner's Brief:

Upon receipt of notice from Foust that he sought the assistance of his union to represent him in his wrongful discharge by the carrier, his union representative took no action to protect Foust's interest until he first contacted the union superior in Omaha, Nebraska. (Ex. 25, P. 20).

The union had knowledge of Foust's wrongful discharge the day after it occurred, February 4, 1971 (Ex. 28, P. 30),

and Wisniski requested information about the discharge from Mr. Jones (Ex. 28, P. 31).

The union took action internally but never set the wheels in motion to facilitate the grievance procedure for Foust until after the time for filing the grievance had expired. Attorney Moriarity wrote to Jones on March 26, and notified him of the need for union assistance (Ex. 24, pp. 4a-6a infra). That request was received by Jones on March 27 (Ex. 29, p. 7a infra). Jones then contacted Wisniski. Wisniski then prepared correspondence to be sent by Jones to Foust (Ex. 29, p. 13a infra). All of this correspondence (a part of Exhibit 29 is attached as an appendix to this Brief for ease of reference.

After Wisniski mailed the correspondence to Jones to be sent to Foust, the dates were inserted by Jones and the documents mailed to Foust.

At the same time a claim for grievances was sent to Mr. Jones for his signature to be mailed to the carrier, thus initiating the grievance procedure (Ex. 29, p. 13a infra). That letter, typed in Omaha, dated and signed in Rawlins, Wyoming, and sent back to Omaha was mailed two days too late (taking the date most favorable to the union. But see pp. 11a-12a infra).

The union had not processed Mr. Foust's prior grievances and did not process the grievance related to this charge (Ex. 28).

In Petitioner's Brief, it is suggested by footnote that the statement "it is not surprising that this claim was denied because of its not having been timely filed" made by the court below was an improper characterization of the facts. It is, however, a fair statement based upon all of the evidence that there can be no claim of surprise that the claim made by the union on behalf of Foust was denied based upon timeliness. This is particularly so in light of the testimony read from the Deposition of Mr. Wisniski at the trial wherein it was stated that it was perfectly appropriate to ask for an

extension of time in which to file a grievance but that was never done in Mr. Foust's case. (Ex. 25).

With these additions, Respondent accepts Petitioner's statement of fact.

ARGUMENT

I.

UNDER THE CIRCUMSTANCES OF THIS CASE PUNITIVE DAMAGES ARE THE PROPER REMEDY FOR A BREACH OF THE DUTY OF FAIR REPRESENTATION IMPOSED UPON A COLLECTIVE BARGAINING AGENT UNDER THE RAILWAY LABOR ACT.

At the outset of this presentation it must be kept in mind that the duties of a certified collective bargaining agent are two-fold and run in different directions.

The first duty of a collective bargaining agent, and the one which was of paramount importance to Congress in the adoption of the Railway Labor Act, was the duty to negotiate with employers working conditions, rates of pay, hours and the like on behalf of employees. The legislative history of a similar act relating to employees other than Railway employees makes this clear, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 485 (1957).

The relationship between the employer and the collective bargaining agent was mechanically dealt with before the National Labor Relations Board which was set up as the enforcement agency of the Government to carry out the policy established by Congress.

The second duty of the collective bargaining agent, which runs opposite from the first, is a duty to the members of the collective bargaining unit to represent them fairly in its dealings with them either individually or collectively. This duty although not clearly spelled out in the statute has been imposed upon the collective bargaining agent by the courts,

Elgin, Jolliet and Eastern Railway Company v. Burley, 325 U.S. 711 (1944). *Steele v. Louisville and Nashville Railroad Company*, 323 U.S. 192 (1944); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Conley v. Gibson*, 355 U.S. 41 (1957).

This court pointed out the absence of statutory direction imposing the duty of fair representation in *Elgin, Jolliet and Eastern Railroad Company v. Burley*, supra.

> "Whether or not the agent's exclusive power extends also to the settlement of grievances, in conference or in proceedings before the Board, presents more difficult questions. The statute does not expressly so declare. Nor does it explicitly exclude these functions. The questions therefore are to be determined by implication from the pertinent provisions." 325 U.S. 729.

It was stated that the duty must be implied from the statute:

> "But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority... The use of the word "representative," as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." *Steele v. Louisville and Nashville Railroad Company*, supra at 199.
>
> * * * *
>
> "Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in

> carrying out these functions than it can in negotiating a collective agreement." [Footnote omitted] *Conley v. Gibson*, supra at 46.

Although petitioner's brief tends to confuse these two duties they cannot be intermingled in this case. The differences between the two duties are as significant as the differences between day and night. Vigilance is required to insure that the real issue does not become lost when examining the rights and remedies available to respondent, an individual member of the collective bargaining unit.

The duty itself has been spelled out in a number of contexts. One of the more common definitions is found in *Vaca v. Sipes*, 386 U.S. 171 (1967):

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. 190.

In *Ruzicka v. General Motors Corporation*, 523 F.2d 306 (6th Cir. 1975) the duty was defined as follows:

> "We agree with the Fourth Circuit's analysis of the three-pronged standard established in *Vaca* for determining whether a union has unfairly represented one of its members:
>
> > A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis

> for civil action. *Griffin v. International United Automobile Workers*, 469 F.2d 181, 183 (4th Cir. 1974). See also *De Arroyo v. Sindicato De Trabajadores Packinghouse*, AFL CIO, 452 F.2d 281 (1st Cir.) cert. denied, 400 U.S. 877, 91 S.Ct. 117, 27 L.Ed.2d 114 (1970). We believe that the District Court misread *Vaca* when it held that 'bad faith' must be read into the separate and independent standards of 'arbitrary' or 'discriminatory' treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation." 523 F.2d 309-310. [Footnote omitted]

and it was further stated:

> ". . . when a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation." 523 F.2d 310.

Indeed, the court below adopted the definition from *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554 (1976); *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 715 (10th Cir. 1978). The denial of certiorari on that issue concludes any debate as to the definition of the duty and its breach in the instant case.

The question left to be resolved then is one of appropriate remedy, a question petitioner states has not yet been resolved.

The law to be applied is Federal law, *Textile Workers Union v. Lincoln Mills*, supra, 456.

> "We conclude that the substantive law to apply in suits under §301 (a) is federal law which the courts must fashion from the policy of our national labor laws."

See also *Humphrey v. Moore*, supra., 343-344.

The trial courts are left to fashion an appropriate remedy. The remedies may be either equitable or legal in nature, and "[t]he range of judicial inventiveness will be determined by the nature of the problem." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

Each case comes before the courts under various names and catch-phrases, based upon the facts of each case. In *Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2nd Cir. 1976), Defendant union had Plaintiff arrested for his exercise of his right of freedom of speech in the union hall. Plaintiff brought his cause of action under the Landrum-Griffith Act, 29 U.S.C. 411(a)(2) and (5) and included a state claim for malicious prosecution under New York law. The jury awarded Plaintiff a "modest award of compensatory damages and a large award of punitive damages against the union . . .". The trial judge eliminated the punitive damages award against the union. The court of appeals disagreed with that holding and reinstated the punitive damages judgment, citing *International Brotherhood of Boilermakers v. Braswell* 388 F.2d 193 (5th Cir. 1968), and took the position that a union could be liable for punitive damages under the Landrum-Griffith Act.

In *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1976), *cert. denied* 425 U.S. 958 (1976), a conductor sued his railroad employer and the union. Judgment was entered against the union for One Thousand Five Hundred Seventy Dollars ($1,570.00) in consequential damages and Six Thousand Dollars ($6,000.00) in punitive damages.

The Court found:

> "UTU, however, could be found to have breached its duty to Harrison. A union must serve the interests of all members without hostility, discrimination, arbitrariness or capriciousness toward any. Although a union may exercise discretion in

representing employees, it must act with complete good faith and honesty. This is settled law. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967); *Griffin v. International Union, UAW*, 469 F.2d 181, 182-83 (4 Cir. 1972). See also *Czosck v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970); *Woods v. North American Rockwell Corp.*, 480 F.2d 644 (10 Cir. 1973); *Lewis v. Magna American Corp.*, 472 F.2d 560 (6 Cir. 1972); *Turner v. Air Transport Dispatchers' Association*, 468 F.2d 297 (5 Cir. 1972); *Encina v. Tony Lama Boot Co.*, 448 F.2d 1264 (5 Cir. 1971).

The Court went on to say:

> "Unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation .... Again analogizing the union's duty of fair representation to a constitutional duty, we hold that in the instant case proof of personal animosity or actual malice was not necessary. In telling the jury that it might award punitive damages if it found that UTU acted wantonly or maliciously or that it acted recklessly or in callous disregard of Harrison's rights, or that Harrison's rights were disregarded with unnecessary harshness or severity, the trial court gave unexceptional instructions. Therefore, recovery of punitive damages is sustained." *Harrison v. United Transportation Union*, supra 563, 64.

The judicial inventiveness of remedies set forth is as varied as the cases coming before the court, *Bond v. Local Union 823, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 521 F.2d 5 (8th Cir. 1975) (Damages for breach of contract); *Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382 (8th cir. 1977) (Awarding attorney's fees); *Butler v. Local Union 823, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 514 F. 2d

442, (8th Cir. 1975) (Awarding equitable relief); *Williams v. Pacific Maritime Association* 421 F.2d 1287 (9th Cir. 1970) (Tailoring a complaint on an interlocutory appeal); *Brady v. Trans World Airlines Inc.*, 196 F. Supp. 504 (D. Del. 1961) (Reinstatement and damages, equitable relief); *Crawford v. Pittsburg-Des Moines Steel Co.*, 386 F. Supp. 290 (D. Wyo. 1974) (Breach of Contract); *Tippett v. Ligget and Myers Tobacco Company*, 316 F. Supp. 292 (M.D. N.C. 1970) (Damages and punitive damages); *Sidney Wanzer and Sons Inc. v. Milk Drivers Union Local 753, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 249 F. Supp. 664 (N.D. Ill. 1966) (Specific performance, damages and punitive damages); *Patrick v. I.D. Packing Company*, 308 F. Supp. 821 (S.D. Ia. 1969) (Exemplary damages).

That the courts take the mandate of *Lincoln Mills* seriously can be seen in the following quote from *Tippett v. Liggett and Myers Tobacco Company*, supra,

> "Courts have generally held that punitive damages are not recoverable in §301 actions. While §301 suits are in the nature of contract, unfair representation suits are in the nature of tort. Elements necessary to prove unfair representation – subjective bad faith or arbitrary conduct – are elements normally considered when punitive damages are awarded in the ordinary tort action. Since bad faith and arbitrariness exist in varying degrees, it is conceivable that in cases of extreme conduct punitive damages should be considered in fashioning an appropriate remedy." 316 F. Supp. 292, 298.

We have the created statutory tort implied from the Railway Labor Act, and we have, then, the remedies to be applied to that tort labeled by this court as the breach of duty of fair representation. The traditional tort remedies have stood the judicial system in good stead and punitive damages has always been one method by which the policy of the law is carried out. Its influence can be startling, *Prosser, Handbook on the Law of Torts*, 4th Ed., P. 11.

In a recent case before this court the traditional tort remedy of punitive damages was again affirmed in the context of a union member bringing an action against his union, *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25*, 430 U.S. 290 (1977). In *Farmer*, however, the action was brought in California on the state cause of action for outrageous conduct for the intentional infliction of harm. The action was also couched in terms of breach of contract.

The jury had awarded a verdict of Seven Thousand Five Hundred Dollars ($7,500.00) actual damages and One Hundred Seventy-five Thousand Dollars ($175,000.00) punitive damages. Judgment was entered on the verdict.

It was stated in *Farmer*, relying on *Vaca v. Sipes:*

> ". . . our cases 'demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies' " [Footnote omitted] 430 U.S. at 300-301.

Again there was a recognition of the mandate of *Lincoln Mills* to fashion an appropriate remedy.

The same approach was taken by this court in *United Construction Workers v. Laburnum Construction Corporation*, 347 U.S. 656, where it was stated:

> "To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. 347 U.S. 665.

It was also stated that the position petitioner takes, failure to mention punitive damages by Congress in adoption of

the Railway Labor Act may be construed as a denial of such damages, is simply untenable.

> "On the other hand, it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common law rights to recover damages caused more directly and flagrantly through such conduct as is before us.
>
> Considerable legislative history supports this interpretation. Under the National Labor Relations Act, 1935, there were no prohibitions of unfair labor practices on the part of labor organizations. Yet there is no doubt that if agents of such organizations at that time had damaged property through their tortious conduct, the persons responsible would have been liable to a tort action in state courts for the damage done. See *Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L.Ed 1154, 62 S.Ct. 820." [Footnote omitted] 347 U.S. 666.

A similar result obtained in *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. Russell*, 356 U.S. 634 (1958), a case arising in Alabama where Plaintiff was awarded Fifty Thousand Dollars ($50,000.00) in punitive damages. Indeed, the court in *Russell* quoted from *Laburnum* the language set forth above.

The rationale behind the award of punitive damages was clearly set out:

> "If employee's common law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences [of its acts]." 356 U.S. 645.

While both *Russell* and *Laburnum* arise in the context of state court actions raising issues of state law, such actions are

founded on efforts to further nation labor policy in relationships between bargaining agents and members of the bargaining unit. It would be awkward at best to reach the conclusion that the federal law to be applied as required by *Textile Workers Union v. Lincoln Mills*, supra, depends upon the state law of the state in which the breach of duty occurs.

If unions are not exempt from punitive damages for their tortious conduct in appropriate cases, then petitioner's argument that the award in the instant case violates a national labor policy that protects unions from such awards is clearly without merit.

It is suggested by petitioner that *Deboles v. Trans World Airlines Inc.*, 552 F.2d 1005 (3rd Cir. 1977) stands for the proposition that punitive damages may never be granted. Only a brief review of that case is necessary to establish that the language relied upon by petitioner is *dicta*. It was stated clearly by the *Deboles* Court that punitive damages was not an issue there:

> "We need not decide whether any circumstances exist in which a punitive-type remedy on behalf of employees against a union for union misconduct might be implied under the Railway Labor Act. In the absence of actual injury occasioned by the union's wrongful misstatements, imposing liability in the instant case would be punitive and discordant with the limited remedies available under the Act." 552 F.2d 1019.

Other cases cited by petitioner and relied upon for the proposition that punitive damages may not be awarded against a union arise in the context of an over extension of authority by the National Labor Relations Board, whose duties and powers are spelled out by statute.

It is true that *Republic Steel Corporation v. Labor Board*, 311 U.S. 7 (1940) prohibits the National Labor Relations Board from exceeding its authority and imposing a punishment against the union. The act is clear that such

government activity is barred. No such limitation exists upon the essentially private relationship between the bargaining agent and the member of the bargaining unit. The same can be said of *Local 57, International Ladies Garment Workers Union v. N.L.R.B.*, 374 F.2d 295, (D.C. Cir. 1967) cert. denied 387 U.S. 942 (Government v. Union); *Local 127, United Shoe Workers v. Brooks Shoe MFG Co.*, 298 F.2d 277 (1962) (Union v. Employer under §303 L.M.R.A.); *Williams v. Pacific Maritime Association*, 421 F.2d 1287 (9th Cir. 1970) (Member v. Member).

The trial court is criticized in Petitioner's Brief for failure to follow the decision of *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F. Supp. 290 (D. Wyo. 1974). The trial court obviously considered *Crawford* and found it wanting in its relationship to the instant case (A. 13). The court of appeals considered this issue and reached a different conclusion than petitioner.

> "in our opinion the evidence adduced as to the perfunctory manner of handling the claim was sufficient justification for the submission of the issue of breach of duty to the jury. The Union filed the grievance out of time and it was due to this that the Board denied it. The evidence, in addition to that just mentioned, showed that there had been an earlier effort on the part of Foust to file a claim for wages while he was attending physical therapy sessions. The Union apparently believed that this was cognizable under the Federal Employees' Liability Act, but made little effort to clarify the matter. This serves to give character to the subsequent failure of the Union to pursue the claim in question despite the fact that it had full knowledge of the 60-day limit. At no time did Jones or Wisniski seek to contact Foust by telephone. Instead, despite the shortness of time, they insisted that Foust personally submit the claim to them. This message was contained in a letter prepared in Omaha, mailed to Rawlins and then mailed to Foust the day after the time for submitting a claim had passed. None of

this was necessary. Ordinarily Jones would have been the person to handle a grievance, but Wisniski became a part of the machinery that was used and this delayed the ultimate filing. The jury could consider this as arbitrary, unreasonable and a breach of duty." *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 716, (10th Cir. 1978).

Petitioner would have this court undertake a massive rewriting of the statutory scheme of national labor policy as is set forth in the National Labor Relations Act and the Railway Labor Act in order to provide labor unions a protection that Congress never intended, one which ill serves the national labor policy expounded by those acts. In urging this court to do so, petitioner cites copyright, patent, antitrust, civil rights acts, the omnibus crime control act, the Bank Holding company act amendment of 1970, the equal credit opportunity act and the Truth in Lending Act (see Petitioner's Brief, pp. 35-39).

In each of those situations Congress set forth in clear and unequivocal language the remedies that it intended to be imposed. To suggest then that congressional intent is evident only by its absence is to ignore the obvious. If Congress meant to exclude punitive damages, Congress would have said so. See the Appendix to *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

Petitioner suggests that if punitive damages are allowed against labor unions then a veritable Pandora's box of vexatious and non-meritorious litigation will result, leaving the union open to blackmail by undeserving plaintiffs. This distrust of the judicial system is not only unwarranted but unwise. The union's best protection according to its own brief is the judicial system it so cavalierly maligns. Respondent has little doubt that non-meritorious, vexatious litigation will be given short shrift in the courts of this nation, and rightfully so. Such an unsupported claim amounts to little more than fearful reaction of any miscreant to the proper application of a little well deserved discipline.

II.

PUNITIVE DAMAGES WERE PROPERLY AWARDED ON THIS RECORD

Petitioner insists now as he has insisted before the jury, the trial court and the court of appeals, that the evidence does not warrant the jury's verdict awarding respondent punitive damages. Petitioner has yet to find anyone in agreement.

The careful selection of fact, ignoring the real relationship between the petitioner and respondent in the instant case, is clear from an evaluation of Petitioner's Brief.

Petitioner, therefore, invites this court to substitute its judgment for that of the jury and the courts before it based on the facts carefully selected by Petitioner, as opposed to the whole of the case.

The test of punitive damages was stated in the court below:

> "We are not convinced that actual animosity or express malice or premeditated malice are essential to the award of punitive damages. Wanton conduct or reckless disregard for the rights of the employee should suffice. We approve, therefore, of the submission by the court of the issue of exemplary damages to the jury, and we find no fault in the trial court's instruction." *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 719 (10th Cir. 1978).

Petitioner admits in its brief that the issue was not properly preserved below and should not now be considered, and no claim is made that plain error was committed. (Petitioner's Brief, p. 46).

The trial court's instruction on punitive damages was a correct statement of the law:

> "You are further instructed that the Plaintiff must show more than that the Union did not press

his grievance. You must find by a preponderance of the evidence that the Union in failing to process the grievance acted arbitrarily, capriciously or in bad faith. However, you are also instructed that a Union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner.

You are instructed that the term "arbitrary and capricious" are synonymous and refer to an act done without an adequate principle or an act not done according to reason and judgment. Whether an act is arbitrary or capricious must be judged on the basis of whether the act complained of is reasonable or unreasonable under the circumstances.

You are instructed that the term "bad faith" implies a breach of faith or a willful failure to respond to plain and well understood obligations.

If you find that the Defendant failed to perform a duty owed to the Plaintiff, then you must determine the amount of damages sustained by the Plaintiff as a result of that breach of duty. The measure of damages to be considered by you includes all of the salary and wages, overtime pay, vacation pay, insurance, seniority and fringe benefits which the Plaintiff would have received during the period he would have been working for the railroad company.

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrong doer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or

omission of the Defendants, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

Now, an act or failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the Defendants' act or omission, which proximately caused actual damage to the Plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the Plaintiff a verdict for actual or compensatory damages; and the

jury should also bear in mind, not only the conditions under which, and the purpose for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any part to the case." (Trial Transcript, Vol. II, pp. 264-266).

This statement of the law is essentially the same as that used in *International Union United Auto, Aircraft and Agricultural Implement Workers of America v. Russell*, 356 U.S. 634 (1958). See also *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967); *Barry v. Edmonds*, 116 U.S. 550 (1886); *Lakeshore and Michigan Southern Railway Company v. Prentice*, 147 U.S. 181 (1893); *Scott v. Donald*, 165 U.S. 58 (1897); *Nader v. Allegheny Airlines Inc.*, 512 F.2d 527 (D.C. 1975); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Bond v. Local Union 823 International Brotherhood of Teamsters, Chauffeurs and Helpers of America*, 521 F.2d 5 (8th Cir. 1975); *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1976); *Woods v. Local Union No. 613 of International Brotherhood of Electrical Workers*, 404 F. Supp. 110 (N.D. Ga. 1975); *Sidney Wanzer and Sons Inc. v. Milk Drivers Union Local 753 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 249 F. Supp. 664 (N.D. Ill. 1966); *Tippett v. Liggett and Myers Tobacco Co.*, 316 F. Supp. 292 (M.D. N.C. 1970).

The test set forth in *Woods v. Local Union No. 613 of the International Brotherhood of Electrical Workers*, supra., is appropriate here:

> ". . . the better rule is to allow recovery of punitive damages under the LMRDA if the union acts with actual malice or reckless or wanton indifference to a member's rights. *International Brotherhood of Boilermakers, etc. v. Braswell*, 388 F.2d 193 (5 Cir.) cert. denied, 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed.2d 854 (1968). The Fifth Circuit stated that the purpose of the LMRDA is to ' "eliminate or prevent improper practices on the part of labor organizations," ... 29 U.S.C. §401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent ... As in all remedial legislation, LMRDA should be liberally construed to effectuate its purposes.' " 404 F. Supp. 118.

A statement from *Tippett v. Liggett and Myers Tobacco Company*, supra., is also apropos of the case at bar:

> "Courts have generally held that punitive damages are not recoverable in §301 actions. While §301 suits are in the nature of contract, unfair representation suits are in the nature of tort. Elements necessary to prove unfair representation – subjective bad faith or arbitrary conduct – are elements normally considered when punitive damages are awarded in the ordinary tort action. Since bad faith and arbitrariness exist in varying degrees, it is conceivable that in cases of extreme conduct punitive damages should be considered in fashioning an appropriate remedy." 316 F. Supp. 298.

The facts of this case display a reckless disregard for the rights of petitioner, "a wanton indifference" a "disdain" to the members of petitioner's union and their rights under the collective bargaining agreement negotiated by petitioner. The Court below clearly pointed this out, *Foust v. International Brotherhood of Electrical Workers*, supra. 716. The trial court gave appropriate instruction, and based upon the evidence, the jury was entitled to find that the union had acted in such a callous manner as to support an award of punitive damages under that instruction. This court should not now substitute its judgment for the jury who heard the evidence.

CONCLUSION

To borrow a phrase from petitioner's Brief "punitive damages . . . are strong medicine". Strong medicine is required to cure social ills before they reach epidemic proportions. Punitive damages have always been available to protect the rights of private citizens in their relationship with others.

A good dose of punitive damages, not unlike a good dose of castor oil, will stand as a constant reminder for the petitioner and others so situated to take care of their own body. Without strong medicine the ills manifested by petitioner in this case may become fatal.

Respectfully submitted

Terry W. Mackey
Urbigkit, Mackey & Whitehead, P.C.
The Mall, Suite One
1651 Carey Avenue
P. O. Box 247
Cheyenne, WY 82001

Attorneys for Respondent

CERTIFICATE OF SERVICE

Terry W. Mackey, of Urbigkit, Mackey & Whitehead, P.C., hereby certifies that on the 2nd day of January, 1979, he served a true and correct copy of the foregoing Brief for Respondent by mailing copies thereof and depositing same in the United States Post Office at Cheyenne, Wyoming, postage prepaid, to:

William J. Hickey and
Edward J. Hickey, Jr.
Mulholland, Hickey, Lyman,
McCormick, Fisher & Hickey
1125 Fifteenth Street, N.W.
Suite 400
Washington, D.C. 20005

Laurence J. Cohen
Sherman, Dunn, Cohen & Leifer
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 Sixteenth Street, N.W.
Washington, D.C. 20005

George Kaufmann
2101 L. Street, N.W.
Washington, D.C. 20037

Terry W. Mackey
Urbigkit, Mackey & Whitehead, P.C.

APPENDIX

C 74-50 Civil
Defendants' Exhibit 5

February 5, 1971

Mr. D. F. Jones
District Chairman
514 12th Street
Rawlins, Wyoming 82301

Dear Brother Jones:

Enclosed copy of letter received from Mr. C. O. Jett, Superintendent Communications to L. D. Foust, Radioman, Cheyenne, Wyoming concerning proper leave of absence.

Please furnish all the necessary information available to you in connection with the Carriers statement that Mr. Foust did not comply with the rules governing proper leave of absence.

With best wishes, I am

Fraternally Yours,

Leo Wisniski

PLAINTIFF'S
EXHIBIT 7

No. C-74-50-Civil
Defendants' Exhibit 6

RAWLINS WYO
FEB. 9, 71

LEO WISNISKI
GENERAL CHAIRMAN IBEW
5836 SPRING ST.
OMAHA NEBR. 68106

ENCLOSED IS ALL CORRESPONDENCE REFERENCE TO MR. FOUST I ALL SO HAVE PHOTO COPYS OF IT ALL IF YOU HAVE ANY QUESTIONS ABOUT.

AS FOR LEAVE OF ABSENCE FOR MR. FOUST THE LAST LEAVE OF ABSENCE THAT I RECEIVED WAS FOR 90 DAYS FROM SEPT. 23, 70 THRU DEC. 22, 70 WHICH CAME TO ME WHILE I WAS ON VACATION AND I SIGNED IT WHEN I RETURNED FROM VACATION AND FORWARDED IT TO MR. JETT AND RETAIN ONE COPY FOR MY FILE WHICH I AM INCLOSING.

YOURS, D.F.JONES

PLAINTIFF'S
EXHIBIT 8

BEST COPY AVAILABLE

FORM 193 7-62-100M

UNION PACIFIC RAILROAD COMPANY
REQUEST FOR LEAVE OF ABSENCE

[illegible] ______ [illegible] (Location) ______ [illegible] (Date) 19 [illegible]

I request leave of absence of ____ month [illegible] day [illegible] from [illegible] 19 [illegible] through [illegible] 19 [illegible]

for the following reason [illegible]

I entered the service [illegible] 19 [illegible] Last Leave [illegible] days to [illegible] 19 [illegible]

My Group Life Insurance should be ______ (Continued or canceled) ______ Premium contributions for this period are to be ______ (Paid in cash or deducted from pay roll in advance) ______ I understand that insurance will be canceled if premium contributions are not paid on or before the tenth day of the first month following that to which they apply. I further understand that if my employee relationship is terminated, insurance will be canceled as of midnight of the thirty-first day after such termination and any unearned premium paid will be refunded. This leave of absence is requested in accordance with and, if approved, will be subject to all applicable provisions of the current rules and regulations of the company governing the conditions of my employment. I understand that if I accept any employment except as provided for herein, my leave of absence and all employment rights with the Union Pacific Railroad Company shall be automatically terminated.

My address during leave will be [illegible]

(Title of Position) ______ (Department or Bureau) ______ (Card Number) ______ (Signature)

THIS FORM OF REQUEST WHEN PROPERLY APPROVED WILL CONSTITUTE A LEAVE OF ABSENCE FOR THE PERIOD SET FORTH ABOVE.

Recommended: [illegible]

Service and absence records correct; I recommend request be granted.

______ (Signature)

Approved: [illegible]

(Title)

I hereby certify that the foregoing request for leave of absence has been properly approved and the original has been delivered to / sent to ______ (Person Requesting Leave) personally. / by registered or certified mail to the address referred to above.

This ______ day of ______ 19 ______

______ (Head of Department or Person Authorized to Handle)

March 26, 1971

Mr. D. F. Jones
514 - 12 Street
Rawlins, Wyoming 32301

RE: L. D. Foust–Radioman L.U. no. 775,
Sen. Date 5-14-62 – Social Security No. 508-32-2651

Dear Mr. Jones:

We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the agreement between the Union Pacific Railroad and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957. If you are not the officer so authorized under Rule 21 would you please, in your official capacity as union representative of Mr. Foust, please inform us by return mail who is the officer of the carrier authorized to receive grievances and also, please forward on to him this written grievance claim which we are submitting pursuant to Rule 21.

On February 5, 1971, Mr. L. D. Foust received a letter from Mr. C. O. Jett, a carbon of which was sent to Mr. Leo Wisniski, General Chairman of the I.B.E.W., which terminated Mr. Foust's services with the Union Pacific Railroad. A copy of this letter is attached. It is Mr. Foust's contention that his termination was in clear violation of the agreement between the Union Pacific Railroad and the International Brotherhood of Electrical Workers. Mr. Foust has complied with Rule 25 of said agreement which deals with personal injury. He has filed all papers requested of him by the Union Pacific Railroad. His doctor, Doctor Taylor, has kept the Union Pacific informed as to Mr. Foust's medical progress. Dr. Taylor is a Union Pacific doctor.

PLAINTIFF'S
EXHIBIT 9

Mr. D. F. Jones
March 26, 1971
Page 2

RE: L. D. Foust

Pursuant to Rule 21 Mr. Foust is making this written report of his grievance claim and hereby requesting the International Brotherhood of Electrical Workers to do everything within their power to enable Mr. Foust to be re-enstated as an employee of the Union Pacific Railroad without any loss of wages or loss of seniority. The action of Mr. C. O. Jett was completely arbitrary and capricious, without proper foundation. We will be more than happy to supply you with any and all information we have concerning this incident to assist you in the investigation of this matter.

A carbon of this letter is being sent to Mr. Wisniski and to the President of the International Brotherhood of Electrical Workers to insure that proper notification is given to the union pursuant to Rule 21 and also enter an attempt to help to expedite this matter.

As you are well aware, Mr. Foust filed another claim with you on June 17, 1970 in regards to a union agreement violation that came to his knowledge in late May, 1970. According to Rule 21, paragraph one, all claims not disallowed within 60 days are to be deemed allowed. Mr. Foust to this date has never received any correspondence from you in regards to this claim that he filed on June 17, 1970. You informed him in December by telephone that the union was not going to do anything in regards to his claim due to the fact that he had retained our law firm to assist him in his personal injury claim against the Union Pacific Railroad. For your knowledge and for the knowledge of Mr. Wisniski, who I understand gave you this information to convey to Mr. Foust, Mr. Foust did not retain our firm until late November, 1970, long after the 60 day claim period had expired. We would appreciate some acknowledgment of this claim we are herewith mailing and appreciate any and all support the union can give Mr. Foust in regards to this matter. As I indicated to you in our letter of January 21, 1971, Mr. Foust is presently and has always been a strong union man. He looks towards the

union for security and backing but is becoming very disheartened by the unions lack of cooperation.

If I can assist you in any way or if you require any information from Mr. Foust in regards to this claim, please let me know at your early convenience.

Very truly yours,

Edward P. Moriarity

EPM:pa

cc: Leo Wisniski
cc: Mr. Pillard

STICK POSTAGE STAMPS TO ARTICLE TO COVER POSTAGE (first class or airmail), CERTIFIED MAIL FEE, AND CHARGES FOR ANY SELECTED OPTIONAL SERVICES. (See front)

1. If you want this receipt postmarked, stick the gummed stub on the left portion of the address side of the article, leaving the receipt attached, and present the article at a post office service window or hand it to your rural carrier. (No extra charge)
2. If you do not want this receipt postmarked, stick the gummed stub on the left portion of the address side of the article, detach and retain the receipt, and mail the article.
3. If you want a return receipt, write the certified mail number and your name and address on a return receipt card, Form 3811, and attach it to the back of the article by means of the gummed ends. Endorse front of article RETURN RECEIPT REQUESTED.
4. If you want the article delivered only to the addressee, endorse it on the front DELIVER TO ADDRESSEE ONLY. Place the same endorsement in line 2 of the return receipt card if that service is requested.
5. Save this receipt and present it if you make inquiry.

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.

☐ Show to whom, date and address where delivered ☐ Deliver ONLY to addressee

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO. C22277

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED 3/27/75

SHOW WHERE DELIVERED (*only if requested*)

MAR 27

(3)

Rawlins, Wyoming
April 5, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

This with reference to letter of March 26, 1971 received from Attorney Edward P. Moriarity relative to grievance in your behalf.

It is proper procedure for the employee to make his claim or grievance known in writing to the District Chairman for consideration for handling with the Carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing by or on behalf of the employe involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

Yours truly,

D. F. Jones
District Chairman
D. F. Jones

PLAINTIFF'S
EXHIBIT 10

No. C-74-50 Civil
Defendants' Exhibit 8

Rawlins, Wyoming

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

This with reference to letter of March 26, 1971 received from Attorney Edward P. Moriarity relative to grievance in your behalf.

It is proper procedure for the employe to make his claim or grievance known in writing to the District Chairman for consideration for handling with the Carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing by or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

Yours truly,

D. F. Jones
District Chairman

U.S. District Court (Wyoming)
Def. Exhibit H
Doc. No. _____

PLAINTIFF'S
EXHIBIT 10(a)

APRIL 6, 71
RAWLINS, WYO.

L. D. FOUST
1502 ADAMS AVE.
CHEYENNE WYO.

REFERENCE TO THE LETTER RECIEVED FROM YOUR ATTORNEYS. I HAVE FILED YOUR CLAIM WITH THE PROPER AUTHORITES UNDER THE EXISTING AGREEMENT AND AS YET HAVE NOT RECIEVED AND ANSWER.

D. F. JONES
D. F. Jones
DISTRICT CHAIRMAN

PLAINTIFF'S
EXHIBIT 11

Rawlins, Wyoming
April 6, 1971

Mr. H. M. Robertson
Asst. to the Supt. Comms.
Omaha, Nebraska

Dear Sir:

I hereby submit claim in favor of Mr. L. D. Foust, Radioman, Cheyenne, Wyoming who was unjustly dismissed from service account failing to renew medical leave of absence.

The Union Pacific Railroad Company is in violation of the Agreement for terminating Mr. Foust's service, due to the fact they are directly liable for his on duty injury, therefore, I request he be reinstated to service, compensated for all time lost, inimpared seniority, vacation rights, and all benefits due under current agreements.

Very truly yours,

D. F. Jones

D. F. Jones
District Chairman

C.O.J.
APR 12 1971

H.M.R.
APR 13 1971

Carrier's Exhibit "D"

PLAINTIFF'S
EXHIBIT 12

Rawlins, Wyoming
April 8, 1971

Mr. H. M. Robertson
Asst. to the Supt. Comms.
Omaha, Nebraska

Dear Sir:

I hereby submit claim in favor of Mr. L. D. Foust, Radioman, Cheyenne, Wyoming who was unjustly dismissed from service account failing to renew medical leave of absence.

The Union Pacific Railroad Company is in violation of the Agreement for terminating Mr. Foust's service, due to the fact they are directly liable for his on duty injury, therefore, I request he be reinstated to service, compensated for all time lost, inimpared seniority, vacation rights, and all benefits due under current agreements.

Very truly yours,

D. F. Jones
D. F. Jones
District Chairman

EXHIBIT NO. 13

April 6, 1971

Mr. D. F. Jones
District Chairman
514 12th Street
Rawlins, Wyoming 82301

Dear Brother Jones:

Enclosed copy of letter for date and your signature to be sent to L. D. Foust, with copy to his Attorney and copy for your file as suggested by the International Office.

Upon receipt of your answer to L. D. Foust claim filed with Mr. H. M. Robertson, sent copy of his reply to this office immediately. You will be advised as to an answer to Foust. It imperative you comply with these instructions so as to keep you clear of any legal action that may arise.

With best wishes, I am

Fraternally yours,

Leo Wisniski

U.S. District Court (Wyoming)
Defendant Exhibit J
Doc. No. _____

PLAINTIFF'S
EXHIBIT 14

Rawlins, Wyoming
April 9, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

With further reference to letter of March 26, 1971 from your Attorney Mr. Edward P. Moriarity in connection with grievance in your behalf.

This is to advise you that I as District Chairman, Seniority District No. 1, am the employe's duly authorized representative to handle initial claims and grievances as per Rule 21, if and when the claims or grievances are presented in writing, stating the nature of the rule violation as per controlling agreement.

As to your claim filed with office on June 17, 1970 relative to your personal on duty injury, I stated to you by telephone at that time, there are no provisions by agreement for filing claims due to medical reasons or injuries under the terms of the present agreement when employe's are withheld from service by Doctors orders, and suggested at that time you engage legal assistance to file your claim for injuries under the terms of the Federal Liability Act, and it is my understanding they withhold employes from service. In practically all the awards, the Adjustment Board has ruled in favor of the Carrier whereas their Doctors have withheld employe's from service due to Medical or injuries.

In conclusion, I wish to make it clear that you can expect full cooperation from this office in assisting your Attorney in any way possible. Furthermore, any misunderstanding relative to our telephone conversation, I nor any other officer of the IBEW have *never* refused to handle any claim or grievance under the terms of the agreements.

Yours truly,
D. F. Jones

D. F. Jones
District Chairman

cc: Mr. Edward P. Moriarity

PLAINTIFF'S
EXHIBIT 15